No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL.,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS OF INTERNATIONAL LITIGATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici curiae are professors of international litigation with expertise in the various doctrines of U.S. law based on international comity. They have a strong interest in the proper application of these doctrines by U.S. courts. A list of *amici* and their qualifications is provided in the appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners alleged that respondents and their co-conspirators established a cartel to fix the prices of vitamin C exported to the United States in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Respondents did not deny the allegations but rather claimed that their actions had been required by Chinese law, and respondents moved to dismiss the complaints under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity. *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 180 (2d Cir. 2016). The Ministry of Commerce of the People's Republic of China filed an amicus brief supporting respondents, which represented that under Chinese law all vitamin C legally exported during the relevant time had to be sold at coordinated prices. *Id.* at 182. The district court rejected each of respondents' three defenses, both upon a motion to

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[1] All parties have consented to the filing of this brief. Petitioners' consent is on file with the Clerk. On February 15, 2018, Respondents filed a blanket consent letter with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

dismiss and, following discovery, upon a motion for summary judgment. *Id.* After a jury found respondents liable for violating the Sherman Act, the district court awarded petitioners approximately $147 million in damages and permanently enjoined respondents from further violations of the Sherman Act. *Id.*

On appeal, the Second Circuit declined to address the act of state doctrine or the doctrine of foreign sovereign compulsion. *Id.* at 194. Instead, the court of appeals held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." *Id.* at 179. The court of appeals applied a "multi-factor balancing test," *id.* at 184-85, developed by the Ninth and Third Circuits in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). The Second Circuit read this Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993), as establishing a prerequisite to any such analysis: that complying with both U.S. and foreign law would be impossible. *Vitamin C*, 837 F.3d at 185-86. To answer that preliminary question, the court of appeals had to determine the content of Chinese law and thus "the amount of deference that we extend to the Chinese Government's explanation of its own laws." *Id.* at 186. The court held that it was "bound to defer" to the Chinese Government's representations. *Id.* at 189. It found that respondents could not comply with both U.S. and Chinese law, *id.* at 192, and after weighing the other factors in its multi-factor test, the court of appeals concluded that "the district court abused its discretion by failing to abstain on international

comity grounds from asserting jurisdiction." *Id.* at 194.

Petitioners filed a petition for certiorari presenting three questions: (1) whether the court of appeals erred in reviewing the motion to dismiss rather than the final judgment; (2) whether the court of appeals erred in treating the Chinese Government's representation as conclusive; and (3) whether the court of appeals erred in holding that it could abstain from exercising jurisdiction on a case-by-case basis. In response to this Court's call for the views of the United States, the Solicitor General recommended that the petition be granted limited to the second question presented, noting possible procedural problems with the first and third questions. This Court granted certiorari limited to the second question in the petition.

In answering that question, the Court should take care not to endorse the Second Circuit's doctrine of abstention based on international comity. First, as this Court acknowledged when it limited its grant to the second question, it is not necessary to address abstention to answer the question presented. The principle of international comity is the foundation for many doctrines of U.S. law, each of which has specific requirements tailored to a particular context. How much weight a U.S. court should give as a matter of international comity to the representation of a foreign government about the content of its own law is a separate question from whether a U.S. court should be allowed to dismiss a case over which it has subject matter jurisdiction on the basis of international comity.

Second, the Second Circuit's doctrine of abstention based on international comity conflicts

with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity. Viewed as a doctrine of prescriptive comity, the Second Circuit's doctrine conflicts with this Court's decisions finding that a case-by-case balancing approach is "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2108 (2016) (rejecting "case-by-case inquiry"); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 259 (2010) (criticizing the "methodology of balancing interests"). Viewed as a doctrine of adjudicative comity, the Second Circuit's doctrine runs against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Second Circuit's doctrine also threatens to supplant more narrowly tailored doctrines of international comity, such as the doctrine of foreign sovereign compulsion and the act of state doctrine that were raised below in this case. This Court has carefully placed limits on each of those doctrines, limits that would effectively become irrelevant if this Court were to endorse the broad doctrine of abstention that the Second Circuit applied.

Having granted certiorari limited to the second question presented, this Court should answer that question only and should not prejudge any of the other comity questions raised by this case.

ARGUMENT

I. IT IS NOT NECESSARY TO ADDRESS ABSTENTION BASED ON INTERNATIONAL COMITY IN ORDER TO ANSWER THE QUESTION PRESENTED

As argued to the courts below, this case involves a number of doctrines based on international comity. Those doctrines include the three defenses raised by respondents and addressed by the district court: the act of state doctrine, the doctrine of foreign sovereign compulsion, and abstention based on international comity. They also include the recognition of foreign law, and as part of that analysis, the question presented in this case of what deference to give a foreign government's representations in determining the content of foreign law. The Second Circuit answered the question presented in the context of applying a doctrine of abstention based on international comity. But those two comity questions are distinct, and it is not necessary for this Court to address abstention based on international comity in order to answer the question presented.

"International comity reflects deference to foreign states that international law does not mandate." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 101 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017).[2] American law contains many doctrines based

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[2] All tentative drafts of the Fourth Restatement cited in this brief have been approved by the membership of the American Law Institute ("ALI") and represent its official position. The numbering of some of the cited sections will change in the final version of the Fourth Restatement.

on international comity. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2099-2019 (2015) (reviewing doctrines).

Prescriptive comity is the basis for recognizing foreign law, both under conflict-of-laws rules, *see, e.g.*, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of one [country], will, by the comity of nations, be recognized and executed in another . . . ."), and under the act of state doctrine, *see, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918) (noting that the act of state doctrine "rests at last upon the highest considerations of international comity and expediency"). This Court has also held that "principles of prescriptive comity" may limit the reach of U.S. law. *Empagran*, 542 U.S. at 169; *see also RJR*, 136 S. Ct. at 2100 (noting that presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries").

Adjudicative comity is the basis for recognizing foreign court judgments in the United States. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (noting that recognition of foreign judgments depends on "the comity of nations"). Doctrines of adjudicative comity like *forum non conveniens* may also restrain the jurisdiction of U.S. courts. *See RJR*, 136 S. Ct. at 2115 (Ginsburg, J., concurring and dissenting) (noting that "comity concerns" can be met through "the doctrine of *forum non conveniens* [that] enables U.S. courts to refuse jurisdiction");

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publication of which is expected in 2018. Although some of the *amici* worked on the Fourth Restatement, they file this brief in their individual capacities. This brief should not be taken to represent the views of the ALI.

Am. Dredging Co. v. Miller, 510 U.S. 443, 467 (1994) (Kennedy, J., dissenting) (noting that "the *forum non conveniens* defense promotes comity").

Sovereign-party comity is the basis for recognizing foreign governments as plaintiffs in U.S. courts, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) ("Under principles of comity . . . , sovereign states are allowed to sue in the courts of the United States."), and for restraining the jurisdiction of U.S. courts over foreign governments as defendants under the doctrine of foreign sovereign immunity, *see, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2004) ("Foreign sovereign immunity" is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.").

Some doctrines of international comity are codified in federal or state statutes. *See, e.g.*, Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611); Uniform Foreign-Country Money Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 2005) (adopted in 21 states and the District of Columbia). Some are principles of statutory interpretation. *See, e.g., RJR*, 136 S. Ct. at 2100 (noting presumption against extraterritoriality as "a canon of statutory construction"). Some are doctrines of federal common law, *see, e.g., Sabbatino*, 376 U.S. at 427 ("We conclude that the scope of the act of state doctrine must be determined according to federal law."), and some are doctrines of state common law, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal

courts must apply state conflict-of-laws rules); *see also Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1973) (holding that *Klaxon* applies in international cases). But each doctrine of international comity has its own requirements. There is no overarching doctrine of international comity that applies in all cases.

In federal courts, the determination of foreign law is governed by Federal Rule of Civil Procedure 44.1. How much weight to give a foreign government's representations about the content of its own law under Rule 44.1 is a question of international comity. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 101 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017) ("International comity reflects deference to foreign states that international law does not mandate."); *see also* Dodge, *International Comity*, 115 Colum. L. Rev. at 2078 ("International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law."). *Amici* take no position on the question presented, but they note that it is a separate comity question from the question whether a federal court may abstain from exercising jurisdiction based on international comity. Having granted certiorari limited to the second question presented, this Court should answer that question only and should not prejudge any of the other comity questions raised by this case.

II. THE SECOND CIRCUIT'S DOCTRINE OF ABSTENTION BASED ON INTERNATIONAL COMITY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

This Court should be particularly careful not to endorse the Second Circuit's doctrine of abstention based on international comity because that doctrine conflicts with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity.

A. THE SECOND CIRCUIT'S ABSTENTION DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT

It is not entirely clear whether the court of appeals decided to abstain as a matter of prescriptive comity or adjudicative comity. On the one hand, the court of appeals reviewed the district court's denial of the motion to dismiss on international comity grounds for abuse of discretion, *Vitamin C*, 837 F.3d at 183, which is typically the standard of review for doctrines of adjudicative comity. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 246, 257 (1981) (adopting abuse of discretion standard for *forum non conveniens*); *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (adopting abuse of discretion standard for international comity abstention). On the other hand, the court of appeals did not apply the requirements for its own adjudicative comity doctrine of "international comity abstention," *Royal & Sun All. Ins.*, 466 F.3d at 92,

which requires both the existence of a pending and parallel foreign proceeding and exceptional circumstances justifying dismissal, *id.* at 93.[3] But no matter how the abstention doctrine applied below is characterized, it conflicts with the decisions of this Court.

1. The Second Circuit's Abstention Doctrine Conflicts With This Court's Prescriptive Comity Decisions

Viewed as a doctrine of prescriptive comity, the Second Circuit's abstention doctrine conflicts with this Court's decisions, which have rejected

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[3] The adjudicative comity doctrine called "international comity abstention" is an extension of *Colorado River* abstention to foreign proceedings. *See Royal & Sun All. Ins.*, 466 F.3d at 93 (relying on *Colorado River*, 424 U.S. 800). Most of the other circuits to have adopted this doctrine also require a showing of pending and parallel foreign proceedings and exceptional circumstances justifying dismissal. *See Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 466-69 (6th Cir. 2009); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392-94 (3d Cir. 2006); *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 517-23 (7th Cir. 2001); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000). Only the Ninth and Eleventh Circuits have authorized such abstention in the absence of a pending and parallel foreign proceeding and exceptional circumstances. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 596-615 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004); *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 304 reporters' note 9 (Am. Law Inst., Tentative Draft No. 2, 2016) (discussing international comity abstention). This case presents no occasion for the Court to address whether *Colorado River* abstention should apply to foreign proceedings.

multi-factor balancing as an approach to determining whether federal statutes apply extraterritorially. The Second Circuit relied on the "multi-factor balancing test," *Vitamin C*, 837 F.3d at 184, developed by the Ninth Circuit in *Timberlane*, 549 F.2d 597, and by the Third Circuit in *Mannington Mills*, 595 F.2d 1287. The court distilled those cases into a ten-factor test, which it referred to as the "comity balancing test." *Id.* at 184-85.[4] Applying those factors to the facts of this case, *see id.* at 192-94, the Second Circuit concluded "that China's 'interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.'" *Id.* at 194 (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987)).

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[4] The ten factors are: "(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue." *Vitamin C*, 837 F.3d at 184-85 (citing *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614).

In *Hartford Fire*, the petitioners raised a similar argument, but this Court found it unnecessary to decide whether a federal court may decline to exercise jurisdiction "under the principle of international comity." 509 U.S. at 797. Because the petitioners in *Hartford Fire* did not claim that compliance with both U.S. and foreign law was "impossible," this Court reasoned that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.[5] The Second Circuit read *Hartford Fire* "narrowly," "as suggesting that the remaining factors in the comity balancing

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[5] In *Hartford Fire*, Justice Scalia argued in dissent that customary international law requires a balancing of factors in each case to determine if the exercise of jurisdiction is reasonable, relying on Section 403 of the Restatement (Third) of Foreign Relations Law of the United States (Am. Law Inst. 1987). *See Hartford Fire*, 509 U.S. at 818-19 (Scalia, J., dissenting). However, customary international law imposes no such obligation. The International Court of Justice has held that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*." *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 97, 122 (Feb. 3) (quoting *North Sea Continental Shelf (Germ. v. Den.; Germ. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20)). Other jurisdictions have not followed a practice of case-by-case balancing. *See, e.g.*, *A. Ahlström Osakeyhtiö v. Comm'n* ("*Wood Pulp*"), 1988 E.C.R. 5193, ¶¶ 19-23 (European Court of Justice). In the absence of settled state practice, no customary-international-law obligation can exist. For this reason, the Restatement (Fourth) of Foreign Relations Law concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 211 reporters' note 3 (Am. Law Inst., Tentative Draft No. 2, 2016).

test are still relevant to an abstention analysis." *Vitamin C*, 837 F.3d at 185. In so doing, the court of appeals ignored this Court's subsequent decisions, which have repeatedly disapproved a discretionary, case-by-case approach.

In *Empagran*, an antitrust case governed by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, respondents argued that courts could take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. This Court rejected that argument, concluding that such a case-by-case approach was "too complex to prove workable." *Id.* As an example of this unworkable, balancing approach, the Court cited *Mannington Mills*, *see id.*, one of the two cases from which the Second Circuit drew its multi-factor test. *See Vitamin C*, 837 F.3d at 184. The FTAIA does not apply in the present case because the antitrust claims involve import commerce. *See* 15 U.S.C. § 6a (limiting FTAIA to cases involving trade or commerce "other than import trade or import commerce"). But there is no reason to believe that a case-by-case comity approach is any more workable in antitrust cases not mediated by the FTAIA.

This Court has rejected a case-by-case balancing approach to determine the geographic scope of other statutes as well. Considering the scope of Securities Exchange Act § 10(b) in *Morrison*, the Court criticized the lower courts' "methodology of balancing interests," 561 U.S. at 259, which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* at 260. Instead, this Court adopted a "clear test" that simply asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic

exchange." *Id.* at 269-70. In *RJR*, this Court considered the geographic scope of RICO, holding that two of its substantive provisions apply extraterritorially to the same extent as RICO's underlying predicate acts, 136 S. Ct. at 2101-03, and that RICO's private right of action requires proof of domestic injury to business or property. *Id.* at 2111. The European Community asked this Court to consider the absence of international friction in cases where foreign governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 2108.

There may be statutes for which additional comity limitations are appropriate even if the presumption against extraterritoriality has been overcome. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 cmt. c (Am. Law Inst., Tentative Draft No. 3, 2017) (noting that the presumption against extraterritoriality "does not preclude U.S. courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision"). For example, some courts of appeals have applied a choice-of-law analysis to determine the applicability of the avoidance provisions of the Bankruptcy Code. *See French v. Liebmann (In re French)*, 440 F.3d 145, 152-54 (4th Cir. 2006); *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1049 (2d Cir. 1996); *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 reporters' note 4 (Am. Law Inst., Tentative Draft No. 3, 2017) (discussing bankruptcy cases).

But there is no overarching doctrine of international comity that gives federal courts case-specific authority not to apply federal law in international cases. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017) ("Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law."). What comity limitations are appropriate will vary from statute to statute. *See id.* cmt. d ("U.S. courts have construed statutory provisions to include a variety of other comity limitations depending on the text, history, and purpose of the particular provision."). In the context of antitrust law, in particular, this Court has rejected the Second Circuit's approach as "too complex to prove workable." *Empagran*, 542 U.S. at 168.

2. The Second Circuit's Abstention Doctrine Conflicts With This Court's Adjudicative Comity Decisions

Viewed as a doctrine of adjudicative comity, the Second Circuit's doctrine runs against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817; *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (observing that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). This obligation to exercise jurisdiction is subject to certain exceptions. Federal courts may decline to hear a case "where the relief being sought is equitable in nature or otherwise discretionary," such as a declaratory

judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996). In actions at law, federal courts may stay their proceedings in deference to other federal courts, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and may decline jurisdiction in favor of state courts under narrowly circumscribed abstention doctrines and in other "exceptional" circumstances, *Colorado River*, 424 U.S. at 818. Federal courts may also decline jurisdiction in favor of foreign courts under the doctrine of *forum non conveniens*, provided that "there exists an alternative forum." *Piper*, 454 U.S. at 254 n.22; *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 304 cmt. i (Am. Law Inst., Tentative Draft No. 2, 2016) (noting that "*forum non conveniens* is the only doctrine under which the Supreme Court has approved dismissal in favor of foreign courts").

None of these exceptions to the federal courts' general obligation to exercise their jurisdiction authorizes the abstention doctrine based on international comity that the Second Circuit applied in this case. Petitioners' Sherman Act claim was an action for damages, although the district court also granted injunctive relief. The Second Circuit did not abstain in favor of another federal or state court. Respondents did not seek dismissal under the doctrine of *forum non conveniens*. Indeed, the Second Circuit conceded that petitioners "may be unable to obtain a remedy for Sherman Act violations in another forum." *Vitamin C*, 837 F.3d at 193. The court of appeals' suggestion that "complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes," *id.*, ignores petitioners' rights to seek

compensation for antitrust injuries under federal law and the federal court's obligations to decide those claims. As Justice Scalia noted, writing for a unanimous Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

B. THE SECOND CIRCUIT'S ABSTENTION DOCTRINE THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

The Second Circuit's doctrine threatens to supplant more narrowly tailored doctrines of international comity, such as the doctrine of foreign sovereign compulsion and the act of state doctrine that were raised below in this case. This Court has carefully placed limits on each of those doctrines, limits that would effectively become irrelevant if this Court were to endorse the doctrine of abstention that the Second Circuit applied.

This Court has recognized the doctrine of foreign sovereign compulsion in the context of U.S. court orders for the production of evidence. *See Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that dismissal of a complaint was too harsh a sanction for noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. This Court has not found it necessary to decide whether

foreign sovereign compulsion is a valid defense to antitrust claims, *see Hartford Fire*, 509 U.S. at 799 (noting that compliance with both U.S. and foreign law was not "impossible"); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986) ("Our decision makes it unnecessary to reach the sovereign compulsion issue."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (noting that there was "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing"), but lower courts have recognized the doctrine as a defense in antitrust cases. *See, e.g., Mannington Mills*, 595 F.2d at 1293-94; *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970); *see also* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.2.2 (2017) (recognizing foreign sovereign compulsion defense to antitrust claims). Where courts have recognized the doctrine of foreign sovereign compulsion, they have generally imposed two requirements: (1) that "the person in question appears likely to suffer severe sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 222 (Am. Law Inst., Tentative Draft No. 2, 2016).

The Second Circuit's discretionary abstention doctrine would supplant the more narrowly tailored doctrine of foreign sovereign compulsion. Before abstaining on grounds of international comity, the court of appeals did not require a showing that respondents would be likely to suffer severe

sanctions or even that respondents' conduct had been compelled. Instead, the court held that "[e]ven if Defendants' specific conduct was not compelled by [Chinese law], that type of compulsion is not required" under the comity balancing test. *Vitamin C*, 837 F.3d at 192. Neither did the court of appeals require a showing that respondents had acted in good faith to avoid the conflict. Instead, the court held that "[w]hether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant" under the test it applied. *Id.* at 191. By allowing dismissal of an antitrust claim as a matter of international comity without a showing of either severe sanctions or good faith, the Second Circuit's abstention doctrine effectively makes the more limited doctrine of foreign sovereign compulsion obsolete.

This Court has also emphasized the limits of the act of state doctrine. That doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of the official act of a foreign sovereign performed within its own territory." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 221(1) (Am. Law Inst., Tentative Draft No. 2, 2016). This Court unanimously held in *Kirkpatrick* that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." 493 U.S. at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). *Kirkpatrick* emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention." *Id.* at 406.

The Second Circuit's comity balancing test is precisely the sort of "vague doctrine of abstention" that this Court rejected in *Kirkpatrick*. *Id.* at 406. Although the court of appeals did not reach respondents' act of state defense, *Vitamin C*, 837 F.3d at 194, the court did rely on one of its own pre-*Kirkpatrick* act of state decisions to support the comity balancing analysis. In considering the relevance of respondents' conduct in establishing the Chinese export regime, the Second Circuit reasoned that "inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine." *Id.* at 191 (citing *O.N.E. Shipping*, 830 F.2d at 452). Under *Kirkpatrick*, however, the fact that a claim requires "imputing to foreign officials" even "an unlawful motivation," 493 U.S. at 401, is not sufficient to invoke the act of state doctrine, which applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud*, 246 U.S. at 310). Under the Second Circuit's doctrine of abstention, that limitation of the act of state doctrine becomes irrelevant. Although the act of state doctrine is limited to claims that require a U.S. court to declare invalid the official act of a foreign sovereign, the Second Circuit's discretionary abstention doctrine is not.

At the end of its opinion, the Second Circuit noted: "Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state, foreign sovereign compulsion, or political question defenses." *Vitamin C*, 837 F.3d at 194. If this Court were to endorse the Second Circuit's abstention doctrine, this is likely to

become an increasingly frequent disposition. Discretionary abstention as a matter of international comity would come to supplant the more narrowly tailored international-comity doctrines that this Court has developed.

CONCLUSION

How much weight to give the representations of foreign governments about the content of their own laws is a question of international comity, but it is a question that is separable from whether a federal court may abstain from exercising jurisdiction on grounds of international comity. In answering the question presented, this Court should not endorse the abstention doctrine applied by the Second Circuit, which conflicts with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity.

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APPENDIX

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